Supreme Court of the United States

OCTOBER TERM, 1952

No.

EARL SUVER and ARTHUR CHANEY, *Petitioners*

v.

COMMONWEALTH OF KENTUCKY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The Petitioners, Earl Suver and Arthur Chaney, and each of them, pray that a Writ of Certiorari issue to review a decision and final judgment of the Court of Appeals of Kentucky entered in the above-styled case on June 20, 1952 (R 129, 130) and reaffirmed by denial of Petitioners' Petition for Rehearing on September 26, 1952 (R. 141, 142).

SUMMARY AND STATEMENT OF MATTER INVOLVED

This is a petition for writ of certiorari to the Court of Appeals of Kentucky in the matter of the Petitioners, Earl Suver and Arthur Chaney, who were jointly indicted by the Grand Jury of Union County, Kentucky on February 5, 1951 at the February Term of the Union Circuit Court for violating Section 437.110 of the Kentucky Revised

Statutes (see Appendix to Brief for statute in full) in that they committed the crime of unlawfully, wilfully and feloniously confederating and banding themselves together for the purpose of intimidating, alarming, and disturbing or injuring certain named persons on December 2, 1950. (R. 3, 4)

At the March Term of the Circuit Court of Union County, Kentucky, Petitioners demurred to the indictment on the ground that it was duplicitous and thus charged them with three (3) distinct offenses, namely (1) Banding and Confederating together for the purpose of intimidating, etc., others, (2) Breach of the peace, and (3) Assault and battery. Petitioners' demurrer was overruled, and they objected and excepted. (R. 9) Petitioners then moved the Trial Court to strike surplusage from the indictment charging them with offenses (2) and (3) as abovementioned, and the Court overruled their motion, to which they objected and excepted. (R. 9)

The Respondent's (Plaintiffs in Trial Court) evidence at the Trial Court showed that Petitioners were organizers for the United Mine Workers of America, and that, on December 2, 1950, they, along with several other persons, formed a picket line at the entrance to the Poplar Ridge Coal Mine near Sturgis, Kentucky; that the pickets attempted to flag down employees of the mine as they drove past the picket line in a convoy; that certain of the pickets beat on the employees' cars; that the pickets broke the glass out of some of the passing cars and that two of the employees of the mine were beaten by the pickets. Petitioners' motion for a peremptory instruction finding them not guilty at the close of the Respondent's evidence (R. 10, 52) and Petitioners' objections to certain portions of Respondent's evidence being overruled, Petitioners then objected and excepted. (R. 22, 23, 24, 31, 34, 38, 45, 51, 127)

The Petitioners' (Defendants in Trial Court) evidence at the Trial Court showed that they and other

Union men had assembled at the mine on December 2, 1950 only for the purpose of addressing the workers concerning the benefits of organizing and to induce them to do so. Petitioners admitted being at the mine on the days in question but repeatedly insisted that they had not formed any conspiracy to intimidate, etc., but had merely gone to the mine for the lawful purpose of peaceably organizing the employees thereof; that they neither participated in, advised, nor observed any violence or intimidation and that they were unaware that anyone had been cursed, beaten or prevented from passing into the mine, by force or told anyone that they would not work until the mine was organized. Petitioners offered other evidence in their behalf which was excluded by the Trial Court, to which they excepted (R. 54, 56, 77), and at the close of the evidence, Petitioners moved the Court to instruct the jury to find them not guilty, which motion was overruled, whereupon, Petitioners excepted. (R. 11, 128)

The Trial Court thereupon gave the jury certain instructions (R. 13, 14), to which Petitioners objected on the grounds that their rights under the Taft-Hartley Act (Title 29, Sections 151 and 157, United States Code—See Appendix to Brief herein for statutes in full) were not fully defined, whereupon the Court overruled their objections, and Petitioners excepted. (R. 11, 13, 14, 16, 17) Petitioners further urged this ground for reversal in the Court of Appeals of Kentucky on appeal both in their brief (not a part of record) and in their petition for rehearing after their conviction was affirmed. (R. 136, 137)

The jury in the Trial Court returned a verdict of guilty on March 20, 1951 and imposed a punishment of one (1) year in the Union County, Kentucky, jail and a fine of one thousand dollars ($1,000.00) each. (R. 12). Whereupon Petitioners moved the Trial Court for a new trial because of the errors of the Trial Court heretofore mentioned and because of the excessive punishment to be inflicted upon Petitioners. The Court overruled Petitioners' motion and Petitioners excepted and prayed an appeal

to the Court of Appeals of Kentucky, which was granted. (R. 12, 15)

The Court of Appeals of Kentucky did not write an opinion in the case on appeal but merely stated in a memorandum judgment that they found no error in the action of the Trial Court (Circuit Court of Union County, Kentucky). See judgment of the Court of Appeals, June 20, 1952 (R. 129, 130) and order denying petition for rehearing of September 26, 1952 (R. 141, 142). (Court of Appeals judgment and order not yet reported.)

This petition for a writ of certiorari is filed within ninety (90) days of the time when said judgment of the Court of Appeals of Kentucky became final and there is presented herewith a certified copy of the entire record and proceedings in connection with the case in printed form, including the judgment and orders of the Court of Appeals of Kentucky.

STATEMENT OF BASIS FOR JURISDICTION

This Court has jurisdiction, as provided in Title 28, United States Code, Section 1257, as amended, to review, by certiorari, the action of the Kentucky Courts below which erroneously construed the Federal Statutes and United States Constitutional provisions and thereby deprived the Petitioners, Earl Suver and Arthur Chaney, of their rights, privileges, and immunities under the United States Constitution and Federal Statutes.

Title 28, United States Code, Section 1257 is as follows:

> *"Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:*
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being

repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) *By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.''*

The jurisdiction of this Court on petitioners' petition for writ of certiorari is firmly laid in the errors committed by the Circuit Court of Union County, Kentucky, to all of which petitioners seasonably objected and excepted, and the prejudicial action of said Court in denying the substantial rights of petitioners as guaranteed by Amendments Six, Eight and Fourteen of the Constitution of the United States and by Title 29, Sections 151 and 157 of the United States Code.

The errors of the Trial Court (Circuit Court of Union County, Kentucky) relied upon by petitioners are as follows:

1. The Trial Court erred in the construction of the Taft-Hartley Act (Title 29, Sections 151 and 157 of the United States Code) by not permitting petitioners' theory of their case to be presented in the instructions to the jury defining fully their rights under the sections of the Taft-Hartley Act, as above mentioned. The instructions actually given by the Court to the jury were wholly inadequate and were prejudicial to the petitioners' substantial rights as defined by the Taft-Hartley Act (Sections 151 and 157 of Title 29 of the United States Code). See Appendix to Brief herewith attached for statutes in full.

For presentment of this question to the lower Courts and rulings of the Courts thereon, see R. 11, 13, 14, 16, 17, 136 and 137.

2. The Trial Court's rulings permitted to come before the jury evidence of crimes with which the petitioners had never been charged and to which charges they were unprepared to defend themselves, and were therefore violative of their rights under the Sixth and Fourteenth Amendments to the Constitution of the United States. (R. 22, 23, 24, 31, 34, 38, 45, 51, 127)

3. The Trial Court denied petitioners a fair and impartial trial by permitting the prosecuting attorney in his cross-examination of the petitioner, Arthur Chaney, to exhibit a formidable, unusual and offensive weapon before the jury. (R. 75)

4. The petitioners were denied due process of law under the Fourteenth Amendment of the Constitution of the United States by the Trial Court's permitting conduct on the part of the prosecuting attorney during the trial which was contrary to the rules of procedure established by statute and precedent and to which rigid adherence is ordinarily demanded in Kentucky. (R. 75)

5. The Trial Court's error in overruling petitioners' demurrer to the indictment permitted petitioners to be charged with at least three (3) distinct offenses, viz.: (1) Banding and confederating; (2) Breach of the peace, and (3) Assault and battery. Such action was violative of the Sixth Amendment and the due process clause of the Fourteenth Amendment of the Constitution of the United States. (R. 17)

6. The Trial Court's error to the prejudice of the substantial rights of the petitioners in overruling their motion to strike surplusage from the indictment was violative of petitioners' rights under the due process clause of the

Fourteenth Amendment and under the Sixth Amendment of the Constitution of the United States. (R. 9)

7. The Trial Court's error to the prejudice of petitioners' substantial rights by the admission of incompetent evidence offered by the Commonwealth denied petitioners a fair and impartial trial. (R. 22, 23, 24, 31, 34, 38, 45, 51, 127)

8. The Trial Court's error in overruling petitioners' motion for a peremptory instruction instructing the jury to find each of them not guilty which was made at the conclusion of the evidence offered by the Commonwealth and renewed at the conclusion of all of the evidence denied petitioners a fair and impartial trial as guaranteed by the Constitution of the United States. (R. 10)

9. The Trial Court's error in excluding and refusing to permit petitioners to introduce competent evidence offered by them denied petitioners a fair and impartial trial as guaranteed by the Fourteenth Amendment of the Constitution of the United States. (R. 54, 56, 77)

10. The verdict of the jury in the Trial Court being contrary to the law and evidence and the punishment given being unreasonable and excessive and the verdict having been given under the influence of passion and prejudice amounted to a violation of the Eighteenth Amendment to the Constitution of the United States. (R. 21 to 128)

11. On the whole case, it appears and is true that petitioners were deprived of their liberty without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. (R. 21 to 128)

All of the abovementioned grounds for jurisdiction of this court are substantial and all were committed by the Trial Court (Circuit Court of Union County, Kentucky) and the Court of Appeals of Kentucky (the highest judicial tribunal in Kentucky), which latter court affirmed the Trial

Court's judgment without written opinion. Petitioners seasonably objected to all such errors in the Trial Court and an automatic exception was given to all parties by the court at the beginning of the said trial. (R. 21) Petitioners further rely on the following cases for jurisdiction of the Supreme Court: *McArthur* v. *United States*, 315 U. S. 787, 62 S. Ct. 915, 86 L. Ed. 1192; *Zucht* v. *King*, 260 U. S. 174, 176, 177, 43 S. Ct. 24, 67 L. Ed. 194. (For statutes and Constitutional provisions set out in full, see Appendix to brief, infra, herein.)

QUESTIONS PRESENTED

Did the Trial Court err in violation of petitioners' rights under the Sixth and Fourteenth Amendments to the Constitution of the United States by not sustaining their demurrer to the indictment because it was duplicitous, by not striking from the indictment on motion of the petitioners surplus matters charging other crimes claimed to have been done in the exercise of the conspiracy and by including such surplus matters in the instructions to the jury?

Did the Trial Court err in construction of the Taft-Hartley Act (Sections 151 and 157 of Title 29 of the United States Code) by not permitting petitioners' theory of the case to be presented in the instructions to the jury defining fully their rights under the said sections of the Taft-Hartley Act?

Was the Trial Court's error in admitting incompetent evidence offered by the Commonwealth over petitioners' objections and in excluding competent evidence offered by petitioners violative of their rights under Amendments Six and Fourteen of the Constitution of the United States?

Was the verdict of the jury finding petitioners guilty and fixing their punishment at one (1) year in the Union County, Kentucky Jail each and setting their fine at $1,000.00 each a violation of Amendment Eight to the Constitution of the United States?

REASONS RELIED ON FOR ALLOWANCE OF WRIT

In view whereof Petitioners respectfully urge that the writ should issue because:

1. In affirming the verdict of the jury and judgment of the Trial Court, the Court of Appeals of Kentucky erroneously decided a question arising under a Federal Statute adversely to Petitioners' contentions, and it is believed contrary to the purpose and intent of Congress and because a decision in a case of similar nature has not been rendered by this Court.

2. The matter at issue is of much importance to these Petitioners as their liberty is at stake and to labor in general as their rights to organize for the purpose of collective bargaining under the Kentucky Revised Statutes, the Taft-Hartley Act and the Federal Constitution were not defined by the Court of Appeals of Kentucky; that they have not been defined by this Court, and the fact that decisions of Courts in other states are in conflict thereon. A determination of the issues involved herein is essential in order that the Petitioners herein and other laboring men may exercise their rights and discharge their duties under the laws of their respective States according to the Acts of Congress and the United States Constitution without incurring penalties under the criminal laws.

3. The verdict of the jury and judgment of the Union County, Kentucky Circuit Court affirmed by the Court of Appeals of Kentucky will inflict upon Petitioners herein cruel and unusual punishment and deprive them of their liberty in violation of the Constitution of the United States.

Attached hereto is the brief of petitioners in support of this petition for said writ of certiorari to which reference is respectfully made for discussion of the law involved and of the authorities in support of the rights claimed on behalf of the Petitioners herein.

WHEREFORE, the Petitioners and each of them, pray that a Writ of Certiorari issue to review the decision and judgment entered on the 20th day of June 1952, and affirmed by denial of Petitioners' Petition for Rehearing on the 26th day of September, 1952, to the end that this case may be reviewed by this Court and that said judgment be reversed and set aside by this Court and that said Petitioners may have such further relief as to this Court may seem proper.

HARRISON COMBS,
900 15th Street, N. W.,
Washington, D. C.,

HUBERT MEREDITH,
201½ St. Ann Street,
Owensboro, Kentucky,

WILL TOM WATHEN,
Morganfield, Kentucky,
Attorneys for Petitioners.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

No opinions were written by the Courts below, but the verdict and judgment are found in the record as follows:

Verdict of the jury and judgment in the Union County, Kentucky Circuit Court. (R. 12) (Proceedings in this court are not officially reported.)

Judgment of the Court of Appeals of the Commonwealth of Kentucky affirming conviction. (R. 129, 130) (Not yet reported.)

Order of Court of Appeals of the Commonwealth of Kentucky denying Petitioners' Petition for Rehearing. (R. 141, 142) (Not yet reported.)

STATEMENT OF BASIS FOR JURISDICTION

A Statement of the Basis for Jurisdiction appears in the preceding Petition for Writ of Certiorari under the heading Statement of Basis for Jurisdiction (pages 4-8) which is hereby adopted and made part of this brief.

STATEMENT OF CASE

The Statement of the Case appears in the preceding Petition for Writ of Certiorari under the subject heading of Summary and Short Statement of Matter Involved (pages 1-4).

SPECIFICATION OF ASSIGNED ERRORS

1. The Trial Court erred in the construction of the Taft-Hartley Act (Title 29, Sections 151 and 157 of the United States Code) by not permitting petitioners' theory of their case to be presented in the instructions to the jury defining fully their rights under the sections of the Taft-Hartley Act, as above mentioned The instructions actually given by the Court to the jury were wholly inadequate and were prejudicial to the petitioners' substantial rights as defined by the Taft-Hartley Act.

2. The Trial Court's rules permitted to come before the jury evidence of crimes with which the petitioners had never been charged and to which charges they were unprepared to defend themselves, and were therefore violative of their rights under the Sixth and Fourteenth Amendments to the Constitution of the United States of America.

3. The Trial Court denied petitioners a fair and impartial trial by permitting inflammatory remarks and prejudicial statements to be made by the prosecuting attorney in his cross-examination of the petitioner, Arthur Chaney, and by the prosecuting attorney's exhibition of a formidable, unusual and offensive weapon before the jury.

4. The petitioners were denied due process of law under the Fourteenth Amendment of the Constitution of the United States by the Trial Court's permitting conduct on the part of the prosecuting attorney during the trial which was contrary to the rules of procedure established by statute and precedent and to which rigid adherence is ordinarily demanded in Kentucky.

5. The Trial Court's error in overruling petitioners' demurrer to the indictment permitted petitioners to be charged with at least three (3) distinct offenses, viz.: (1) Banding and confederating; (2) Breach of the peace, and (3) Assault and battery. Such action was violative of the Sixth Amendment and the due process clause of the Fourteenth Amendment of the Constitution of the United States.

6. The Trial Court's error to the prejudice of the substantial rights of the petitioners in overruling their motion to strike surplusage from the indictment was violative of petitioners' rights under the due process clause of the Fourteenth Amendment and under the Sixth Amendment of the Constitution of the United States.

7. The Trial Court's error to the prejudice of petitioners' substantial rights by the admission of incompetent evidence offered by the Commonwealth denied petitioners a fair and impartial trial.

8. The Trial Court's error in overruling petitioners' motion for a peremptory instruction instructing the jury to find each of them not guilty which was made at the conclusion of the evidence offered by the Commonwealth and renewed at the conclusion of all of the evidence denied petitioners a fair and impartial trial as guaranteed by the Constitution of the United States.

9. The Trial Court's error in excluding and refusing to permit petitioners to introduce competent evidence offered by them denied petitioners a fair and impartial trial as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

10. The verdict of the jury in the Trial Court being contrary to the law and evidence and the punishment given being unreasonable and excessive and the verdict having been given under the influence of passion and prejudice amounted to a violation of the Eighth Amendment of the Constitution of the United States.

11. On the whole case, it appears and is true that petitioners were deprived of their liberty without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

ARGUMENT

Petitioners were convicted of the crime of confederating and banding themselves together for the purpose of intimidating, alarming, disturbing or injuring another person or persons in violation of Section 437.110 of the Kentucky Revised Statutes. (See Appendix for Statute stated in full.)

The accusative portion of the indictment reads: "The grand jury of Union County, in the name and by the authority of the Commonwealth of Kentucky, accuse Earl Suver and Arthur Chaney of the crime of confederating and banding themselves together for the purpose of intimidating, alarming, disturbing or injuring another person or persons, committed in manner and form as follows: to-wit:"

The charging portion of the indictment is in this language: "The said Earl Suver and Arthur Chaney, in the County of Union, on the 2nd day of December, 1950, and before the finding of this indictment, did unlawfully, wilfully, and feloniously confederate and band themselves together for the purpose of intimidating, alarming and disturbing or injuring Charlie Carter, Otis Hedgepath, Charlie Marraman, Clarence Steele and Douglas Gregory, and did, in pursuance of said confederating and banding themselves together, intimidate, alarm, disturb or injure the said

Charlie Carter, Otis Hedgepath, Charli[illegible]lie Marraman, Clar-
ence Steele and Douglas Gregory by stop[illegible]pping their cars and
by threatening, cursing and abusing the[illegible]em and threatening
to injure them."

Thus, the indictment charged the pe[illegible]etitioners with sev-
eral offenses, to-wit: (1) Banding and[illegible]d confederating to-
gether for the purpose of intimidating,[illegible], alarming and dis-
turbing or injuring the persons named,[illegible], (2) Breach of the
peace, (3) Assault and battery, etc. S[illegible]Such action of the
Trial Court was in violation of petitioner[illegible]rs' rights under the
due process clause of the Fourteenth A[illegible]Amendment and of
the Sixth Amendment of the Constitut[illegible]tion of the United
States.

That the indictment was duplicitous[illegible] is too well under-
stood to require citation of supporting[illegible] authorities.

When demurrer was filed to this dup[illegible]plicitous indictment
the court should have either sustained t[illegible]he demurrer or re-
quired the Commonwealth to elect whic[illegible]ch charge it would
prosecute. This principle is also too wel[illegible]ll understood to re-
quire supporting authorities. Therefor[illegible]re, the court erred
to the prejudice of petitioners' substanti[illegible]ial rights under the
United States Constitution in overrulin[illegible]g the demurrer to
the indictment.

After the demurrer was overruled pet[illegible]titioners moved the
court to strike, or treat, the following po[illegible]rtion of the indict-
ment as surplusage: "And did, in purs[illegible]suance of said con-
federating and banding themselves to[illegible]gether, intimidate,
alarm, disturb or injure the said Ch[illegible]harlie Carter, Otis
Hedgepath, Charlie Marraman, Clarence[illegible]e Steele and Doug-
las Gregory by stopping their cars a[illegible]nd by threatening,
cursing and abusing them and threatenin[illegible]g to injure them."

By reference to the case of *Commonwealth* v. *Fletcher*, 298 Ky. 585, 183 S.W. (2d) 644, it will be found that the Court of Appeals of Kentucky has explicitly held that language, or a charge, similar to that last quoted above, is mere surplusage and should be ignored. For the sake of convenience, we quote the following from that opinion:

"The indictment charged defendants with confederating and banding together for the purpose of intimidating, alarming or injuring Butt Bolton and his family and it averred that in pursuance thereof they went forth and executed the conspiracy by shooting into Bolton's home and wounding his daughter. An indictment charging conspiracy under KRS 437.110 is sufficent without averring that the conspiracy was actually consummated, since the acts committed pursuant to the conspiracy are immaterial and the offense is completed when the conspiracy is formed. The averment in the indictment that the conspiracy was executed is surplusage. Commonwealth v. Barnett, 196 Ky. 731, 245 S.W. 874; York v. Commonwealth, 285 Ky. 492, 148 S.W. (2d) 337."

Although the court erred in overruling the demurrer to the indictment on account of its duplicity, and erred in overruling the motion to treat as surplusage the charge of consummation of the conspiracy, yet this would not have been so vital to petitioners if the court had ignored the surplusage throughout the trial. This, he did not do. He allowed the charge contained in the surplusage matter to be dwelt upon in the proof and he likewise incorporated it in instruction number one. (R. 13, 14) By so doing, the rights of petitioners were greatly prejudiced. The court allowed the witnesses to dwell at length and to repeat and magnify what the witnesses claimed the petitioners did in the execution of the alleged conspiracy. (R. 24, 31, 34, 38, 45, 51, 127) Moreover, the court not only permitted, but required, the jury to consider not only the proof but the charge contained in the surplusage in making up their verdict. He specifically incorporated in instruction number one the charge contained in said surplusage. We quote from instruction number one in substantiation and for the purpose of emphasizing this statement. Though somewhat voluminous, we quote instruction number one, as follows:

"If you shall believe from the evidence in this case, to the exclusion of all reasonable doubt, that, in this

county, about the 2nd day of December, 1950, and within one year next before the finding of the indictment herein, the defendants, Earl Suver and Arthur Chaney, did wilfully, unlawfully and feloniously confederate or band themselves together for the purpose of intimidating, alarming, disturbing, or injuring, Charlie Carter, Otis Hedgepath, Charlie Marraman, Clarence Steele and Douglas Gregory, or any one or more of said persons, and that in pursuance of said confederating or banding, if any there was, the said defendants did go forth for the purpose of intimidating, alarming, disturbing, or injuring the said Carter, Hedgepath, Marraman, Steele and Gregory, or any one or more of them, *by stopping their cars or by threatening them, or any of them, or by abusing them, or any of them, or threatening injury to them, or any of them*, you should find the defendants guilty as charged in the indictment and fix their punishment by fine in any amount, in your reasonable discretion, or by confinement in the county jail for any length of time, in your reasonable discretion, or you may, in such discretion, both so fine and imprison them."

We submit that the italicized portion of the above instruction should not have been incorporated therein and that its inclusion was prejudiical to the rights of petitioners because the jury was left to, and no doubt did, inflict punishment more on account of what the witnesses said petitioners did in the way of stopping cars, threatening them, abusing them and threatening to injure them than on account of their belief that petitioners had entered into a conspiracy as charged in the accusative part of the indictment. We can only account for the heavy penalty placed upon petitioners by assuming that the jury evidently inflicted punishment both for the conspiracy which was not proven and for the acts alleged to have been done in execution of the conspiracy in the way of intimidating, alarming, disturbing and threatening the persons named in the indictment and in the instruction. Petitioners' rights under the due process clause of the Fourteenth Amendment and un-

der the Sixth Amendment to the Feder Constitution were thus violated. *De Jonge* v. *State of egon 1937*, 57 S. Ct. 255, 299 U. S. 353, 81 L. Ed. 278.

The petitioners had the undoubted legal ight to peaceably assemble, peaceably form a picket l e and contact employees of the Poplar Ridge Coal Compa y and request them to join the Union. They had the righ to use legitimate arguments in support of the request, ch as setting forth their conception of the advantages to e derived by belonging to the Union. They even had the r ht to request the employees not to work until a union was ormed and a contract made by the Union. While instr tion number three advises the jury as to some of the ghts of petitioners, the instructions as a whole are fault because they do not fully advise the jury of the rights of l titioners and do not fully present the theory upon whic they rested their defense. The court should have advis l the jury in his instructions of the rights of the petition rs under the Taft-Hartley Act and of their rights under th statutes and general laws of Kentucky to peaceably assem le and peaceably form picket lines and contact employees f the Poplar Ridge Mine and advise them of the advantage of belonging to the Union, request them to join it and to refrain from working until contract should be signed b the Poplar Ridge Coal Company with the United Min Workers of America, and that an agreement to congrega and form a picket line for said purposes only did not re der petitioners guilty of a conspiracy. In other words, o stated somewhat differently, the court erred in failing to define the rights of petitioners and to instruct the j y as to the theory of their defense. See Title 29, Sec ons 151 and 157 of the Taft-Hartley Act in the United St tes Code.

The jury should also have been instructed in substance that if some one or more of those who had assembled with petitioners, acting independently of petitioners, and without their consent or approval, engaged in acts of violence or abused or molested the agents or employees of the Pop-

lar Ridge Coal Company that such conduct could not be considered by the jury in determining the guilt or innocence of petitioners.

The instructions as a whole are erroneous and did not fully present the law of the case because, as stated, the rights of petitioners and the theory upon which their defense rested were not given to the jury and the jury was left in position to conclude, and doubtless did conclude, that the petitioners and their associates were guilty of law violation by merely assembling and forming a picket line and endeavoring to induce employees of the Poplar Ridge mine to join their Union and refrain from work until a contract was signed by the Company and the Union.

Reference to questions 9 and 10 and the answers, (R. 22), reveal that the court permitted a witness for the Commonwealth to detail what Mr. Suver said in a speech on November 30th, over the objections of petitioners. On the other hand, the court, (R. 56), stopped Mr. Suver and would not allow him to detail the substance of his version of what he said upon that occasion. This ruling of the court was objected to by petitioners and exception was reserved. The court certainly erred in permitting the Commonwealth's witness to detail his version of what Suver said and in refusing to allow Suver to state his version thereof.

The indictment charged petitioners with conspiring to injure others on December 2nd, 1950, but the court, over the objections of petitioners, permitted proof to what occurred on November 30th, and December 1st, to which ruling of the court petitioners duly excepted. Undue advantage was thereby taken of petitioners because they were not apprised by the indictment that they would have to meet and defend charges of their improper conduct on November 30th and December 1st. Attorney for petitioners moved the court to exclude the evidence as to what occurred on Friday, December 1st, but the court overruled the motion and petitioners excepted. (R. 31)

On page 53 of the Record, one of the petitioners was asked, "What method did you employ to induce the employees of that mine to join the union". The court sustained an objection to this question and at page 54 of the Record, it was avowed that: "If permitted to answer he would state that he visited in the homes, and in the streets and public places near the employees of said mine and told them as best he could the advantages of their becoming members of the Union and requested them to join and become members of the United Mine Workers of America. Petitioners certainly had the right to give their version of what they had done in an effort to organize that mine. This is especially true when it is considered that the Commonwealth was allowed to go back and detail what petitioners did prior to December 2nd, the date the indictment charged they formed the conspiracy complained of.

Question 39, page 56 of the Record reads: "State whether or not you exerted any restraint over them or coerced or compelled them to stay there". This question was asked for the purpose of rebutting positive evidence that petitioners had coerced the employees, but the court sustained an objection to this question and the following avowal was made: "That if permitted to answer the witness would state that they exerted no influence and did not compel the men in any way to stop and hear them". Since petitioners were specifically charged in the evidence for the Commonwealth with restraining and compelling employees to stop and listen to them, they certainly had the right in their testimony to deny and dispute that evidence because it went to the very vitals of their defense.

During the course of cross examination of the petitioner, Arthur Chaney, (R. 75), the Commonwealth's Attorney, after, in answer to question 80, Chaney had denied that he had gone down there with any kind of weapon, exhibited in the presence of the jury a large sling shot and asked: "Did you ever see that". Objection was made and before ruling the Commonwealth's Attorney asked, "Did you ever carry that down there". Objection was again made and

Judge Blackwell, of the Trial Court, stated that the time must be confined to either of the three days in question. The Commonwealth's Attorney then asked in substance if he had it down on either of the days mentioned in the evidence, November 30th or the 1st day of December or the 2nd day of December. And the witness denied that he had it there on either of those days. We submit that the improper exhibition of this formidable and unusual weapon before the jury when Commonwealth's Attorney had no right to think the petitioner Chaney would state that he was armed with such a weapon, was improper and highly prejudicial to the petitioners upon the trial of the case and tended to and did, in the opinion of this writer, greatly inflame the minds of the jury and prejudiced them unduly against the petitioners, and that this improper exhibition of this offensive weapon greatly influenced the jury in fixing the severe punishment it meted out to these petitioners.

When considering the errors in the instructions and rulings on the evidence against petitioners and the fact that the jury who tried petitioners were drawn largely from the vicinity in which the very able and popular Commonwealth's Attorney resides and in close proximity to the coal mine in question where a large and powerful coal company has great influence, it is readily apparent that on the whole case the petitioners did not have a fair trial: and it is also apparent that, under the facts of the case, the punishment meted out to them was cruel and unusual in violation of the Eighth Amendment of the Constitution of the United States. May we add that the conduct of either side in these commercial activities does never square with standards prevailing at a Sunday School picnic. And the history of these struggles between capital and labor reveals that courts and impartial juries usually make some degree of allowance for excesses committed during heated controversies between these two powerfully competing groups. The affirmance of this case, which will result in placing these labor leaders in an antiquated jail for a full twelve months

and subjecting them to the payment of a thousand dollar fine, each would, under the circumstances of this case, give to the employer group a very great, unreasonable and unfair advantage to the everlasting injury of these petitioners and in violation of their rights as guaranteed by the Statutes and Constitution of the United States.

For the reasons set forth above, and others apparent upon the face of the record, we most earnestly, though respectfully, request that petitioners' petition for a writ of certiorari be granted.

HARRISON COMBS,
900 15th Street, N. W.,
Washington, D. C.,

HUBERT MEREDITH,
201½ St. Ann Street,
Owensboro, Kentucky,

WILL TOM WATHEN,
Morganfield, Kentucky,
Attorneys for Petitioners.

APPENDIX

Kentucky Statutes, Federal Statutes and Federal Constitutional provisions relied on by petitioners.

Section 437.110 of the Kentucky Revised Statutes:

"(1) No two or more persons shall confederate or band themselves together and go forth for the purpose of intimidating, alarming, disturbing or injuring any person, or of taking any person charged with a public offense from lawful custody with the view of inflicting punishment on him or of preventing his prosecution, or of doing any felonious act.

(2) No two or more persons shall confederate or band themselves together and go forth for the purpose of molesting, damaging or destroying any property of another person, whether the property is molested, damaged or destroyed or not.

(3) Any person who violates this section shall be punished by fine or imprisonment, or both, in the discretion of the jury."

Section 151 of Title 29, United States Code Annotated:

"The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized

in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. June 23, 1947, c. 120, Title 1, § 101, 61 Stat. 136."

Section 157 of Title 29, United States Code Annotated:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain

collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection. As amended June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title 1, § 101, 61 Stat. 140."

Amendment Six to the Constitution of the United States:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amendment Eight to the Constitution of the United States:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Amendment Fourteen, Section 1, to the Constitution of the United States:

"§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."